

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001296-MR

MARK CHRISTIAN

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 13-CI-00028

STEEN FUNERAL HOME¹

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Mark Christian appeals the Lawrence Circuit Court’s July 15, 2013 order granting the motion of Carriage Funeral Services of Kentucky, Inc., d/b/a as Steen Funeral Home (hereinafter “Steen Funeral Home”) to dismiss his complaint against it. The trial court held that Kentucky Revised Statutes (KRS)

¹ Mark Christian incorrectly identified one of the appellants. Rather than “Steen Funeral Home,” the proper party is Carriage Funeral Services of Kentucky, Inc., d/b/a Steen Funeral Home.

189.378 did not impose a duty on the funeral home to place flags or other identifying objects on vehicles or to illuminate the headlights of vehicles traveling as part of a funeral procession. Further, the trial court determined that common law negligence was not implicated since KRS 189.378 was created by the legislature rather than the courts. Accordingly, the trial court dismissed Mark's complaint against the funeral home. After careful consideration, we affirm.²

FACTUAL AND PROCEDURAL BACKGROUND

On November 5, 2011, Mark Christian attended the funeral of a friend at the Steen Funeral Home in Ashland, Kentucky. At the funeral home, the mother of the deceased friend asked Mark, as well as Justin Wallin and Zachary Broun,³ to be Pallbearers.

Since each had driven separately to the funeral home, Zachary offered to drive them, and consequently, Mark was a passenger in his vehicle. Funeral home employees directed Zachary to pull his vehicle into the line for the funeral procession. However, according to Mark's complaint, Steen Funeral Home failed to place flags on vehicles in the funeral procession or clearly mark the vehicles.

While driving to the cemetery, the vehicles in the funeral procession went through several intersections with traffic lights. The funeral procession then headed toward Louisa, Kentucky, where the cemetery was located. The funeral

² This opinion was delayed due to administrative handling.

³ A companion case was filed by Justin Wallin and Zachary Broun in which Benjamin Gibson filed a cross appeal. The case is styled *Justin Wallin, et al v. Carriage Funeral Services of Kentucky, Inc.* No. 2013-CA-000910 and No. 2013-CA-000953.

procession continued south on U.S. 23 to the intersection of KY 645 and U.S. 23. After the vehicles in the front of Zachary turned left onto KY 645, Zachary prepared to turn his vehicle left onto KY 645 from the southbound lane of U.S. 23 when Benjamin Gibson's vehicle, which approached the intersection while traveling north on U.S. 23, collided with Zachary's vehicle.

On February 1, 2013, Mark filed a complaint against Steen Funeral Home, Zachary Broun, and Benjamin Gibson alleging negligence and negligence *per se*. Steen Funeral Home filed a Kentucky Rules of Civil Procedure (CR) 12.02(f) motion to dismiss for failure to state a cause of action. Steen Funeral Home noted that it did not owe a duty to Mark under KRS 189.378 because the statute does not place a responsibility on a funeral home to place flags on vehicles or illuminate the headlights of the vehicles, which are being driven in a funeral procession.

Mark responded to the motion and argued that at the very least Steen Funeral Home owed him a duty of reasonable care because a funeral procession, without any markings or indication that it is a funeral procession, presents foreseeable risk of a motor vehicle accident. He maintained that Steen Funeral Home breached its duty of reasonable care to him by failing to tell Zachary, the driver of the vehicle where he was a passenger, to turn his lights on.

On July 15, 2013, the trial court entered an order granting Steen Funeral Home's motion for dismissal based on the fact that KRS 189.378 imposes

no statutory duty on a funeral director that would impose liability under these circumstances.

On appeal, Mark argues that the trial court erred when it granted the motion to dismiss his claim against Steen Funeral Home. He contends that Steen Funeral Home has a duty of reasonable care in leading a funeral procession and that KRS 189.378 places a duty on the funeral homes to make vehicles in a funeral procession clearly visible to approaching traffic.

Steen Funeral Home responds that Mark failed to state a cause of action for which any relief could be provided. The funeral home admits, for the purposes of the motion, that a funeral procession was formed. But under the requirements of KRS 189.378, Steen Funeral Home claims it did not violate the statute, and therefore, it owed no duty to Justin or Zachary.

STANDARD OF REVIEW

Steen Funeral Home's motion to dismiss was filed pursuant to CR 12.02(f); that is, it argued that the action filed against them should be dismissed for failure to state a claim. "Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (citing *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009)).

ANALYSIS

“It is well settled in this jurisdiction when considering a motion to dismiss under [Kentucky Rules of Civil Procedure (CR) 12.02], that the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true.” *Mims v. Western–Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007) (citing *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987)). Further, a motion to dismiss for failure to state a cause of action should not be granted unless it appears that the plaintiff would not be entitled to relief under any set of facts that could be used to support the claim. *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002).

The case at bar involves negligence. Common law negligence requires proof that the defendant owed the plaintiff a duty of care, that the defendant breached that duty, and that an injury proximately resulted from the breach. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88-89 (Ky. 2003)(citing *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992); *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001)). Moreover, the standard of care applicable to a common-law negligence action is that of ordinary care—that is, “such care as a reasonably prudent person would exercise under the circumstances.” *Slusher v. Brown*, 323 S.W.2d 870, 872 (Ky. 1959).

Negligence *per se* is a negligence claim with a statutory [or regulatory] standard of care substituted for the common law standard of care. *Real Estate Mktg., Inc. v. Franz*, 885 S.W.2d 921, 927 (Ky. 1994) (citation omitted),

overruled on other grounds by *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 741 (Ky. 2011). KRS 446.070 codifies the doctrine of negligence *per se*, and provides: “[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.” Significant to our discussion is that the determination of whether a duty exists is a legal question for the court. *Mullins*, 839 S.W.2d at 248.

The complaint filed by Mark relied on KRS 189.378 to support both negligence and negligence *per se* against Steen Funeral Home. Mark argues that Steen Funeral Home negligently operated its vehicles so that Broun and Gibson collided and that the funeral home violated KRS 189.378 which substantially contributed to the aforementioned collision.

To begin our analysis, we evaluate the negligence *per se* claim by reviewing the portion of KRS 189.378 pertinent to our discussion. Section (1) of the statute reads as follows:

“Funeral procession,” as used in this section, means two (2) or more vehicles accompanying the body of a deceased person when each vehicle has its headlights on or is displaying a pennant attached in such a manner as to be clearly visible to approaching traffic.

Section (2) of the statute states that a funeral procession has the right-of-way at an intersection and may proceed through the intersection if it is led by an escort vehicle displaying flashing yellow, red, or blue lights, except in some cases that are not relevant in this case. Section (3) of the statute requires a person who is

driving in a funeral procession to exercise due caution before assuming the right-of-way described in Section (2). Sections (4) and (5) prohibit vehicles that are not a part of the funeral procession from interfering with the progress of the funeral procession or from appearing to be a part of the funeral procession.

The trial court agreed with Steen Funeral Home that the provisions of the statute do not create a duty for the funeral home. The trial court is correct. Contrary to Mark's assertion, the language of KRS 189.378 does not mandate that a funeral home place pennants on vehicles or illuminate the headlights of vehicles in funeral processions. Rather Section (1) merely says that a funeral procession is created when two or more vehicles accompany the body of the deceased with either the vehicles' headlights illuminated or with a pennant on the vehicle. Nothing in Section (1) mandates any action on the part of funeral homes.

Section (3) does impose a duty but the duty is imposed upon the driver of a vehicle in a funeral procession. The duty is to exercise due caution before entering a right-of-way. In fact, the driver of a vehicle in a funeral procession is not given an absolute right to disregard traffic rules and is under a "duty to exercise ordinary care for the safety of appellant and for those persons in her own car." *Newman v. Lee*, 471 S.W.2d 293, 296 (Ky. 1971).

Within the legal parameters of negligence *per se*, a person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation. *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 99 (Ky. 2000). Negligence *per se* only applies if the alleged offender

has violated a statute and the plaintiff was in the class of persons which that statute was intended to protect. *Id.* at 100.

In the case at hand, no statutory duty was imposed upon funeral homes within the language of KRS 189.378, and therefore, Steen Funeral Home was not in the class of entities whose conduct was intended to be regulated by the statute. Contrary to the assertions in Mark's complaints, no statutory duty of care existed for the funeral home under KRS 189.378. The intent of the statute is to regulate both the drivers of vehicles in a funeral procession and drivers of vehicles coming into contact with funeral processions.

Having decided that negligence *per se* on the part of the funeral home is not involved here, we move on to address Mark's contention that based on *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328, 333-334 (Ky. 1987), Steen Funeral Home owed him a common law duty of reasonable care. The specific issue of whether a funeral home director has a common law duty of care to participants in a funeral procession has not previously been addressed in the Commonwealth.

According to Mark, civil liability is predicated on the duty of common care that each person owes to everyone. He then suggests that the question here is not one of duty, since everyone owes a duty of care, but one of proximate causation, which is a factual rather than legal determination. Mark, thus, implies that questions remain for the jury to decide. He argues that based on the definition

of a “funeral procession” in KRS 189.378, impliedly a funeral procession must be clearly visible to oncoming traffic.

What Mark does not address, however, is that KRS 189.378 does not place a duty on funeral homes but rather on drivers in the funeral procession and the other drivers on the road who come into contact with a funeral procession. Nor does he explain how the statutory language requiring that a funeral procession must be visible is transformed in the statute into a funeral home’s duty.

Initially, we observe that *Grayson* is distinguishable from the situation herein since it has been superseded by statute. Further, Kentucky does not recognize a general “universal duty of care,” a common misperception, which is based on *Grayson*. See *Johnson v. United Parcel Service, Inc.*, 326 S.W.3d 812, 816 (Ky. App. 2010)(citations omitted). In fact, despite misinterpretation to the contrary, Kentucky has never recognized a general “universal duty of care,” which would permit new causes of action to arise that did not previously exist. See *Morgan v. Scott*, 291 S.W.3d 622 (Ky. 2009).

In the case at bar, a statute exists that regulates the duties of parties in a funeral procession. KRS 189.378. One cannot ignore that statutory language or extrapolate from it or the common law an additional duty for funeral homes. As noted above, “negligence *per se* is merely a negligence claim with a statutory standard of care substituted for the common law standard of care.” *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921, 926–27 (Ky.1994). This statute provides no statutory duty of care to funeral homes with regard to funeral

procession. Hence, under this statute, Steen Funeral Home does not owe a duty to Mark. Further, this statute has addressed the duty relevant to funeral procession and obviated any reliance on common law.

The dismissal for failure to state a claim is proper since without a duty on the part of the funeral home, no alleged facts in the complaint establish liability on the part of Steen Funeral Home. Hence, the trial court did not err in granting a motion to dismiss for failure to state a claim since Mark would not be entitled to relief under any set of facts. *James*, 95 S.W.3d 875.

CONCLUSION

Therefore, the trial court's decision to grant Steen Funeral Home's CR 12.02(f) motion to dismiss on its pleadings was proper since it was clearly entitled to a judgment. *Wood v. Wyeth–Ayerst Laboratories, Div. of American Home Products*, 82 S.W.3d 849, 851 (Ky. 2002)(citing *Pari–Mutuel Clerks' Union of Ky. v. Ky. Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977)).

For the reasons stated herein, the order of the Lawrence Circuit Court is affirmed.

ALL CONCUR.

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